Supreme Court, U.S.
FILED
AUG 21 2002
OFFICE OF THE CLERK

No. 02-111

In The
Supreme Court of the United States

AN UNIDENTIFIED PRIVATE CITIZEN,

Petitioner,

vs.

McCLATCHY NEWSPAPERS, INC.,
dba THE SACRAMENTO BEE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P.
REX S. HEINKE – *Counsel of Record*
L. RACHEL HELYAR
2029 Century Park East, Suite 2400
Los Angeles, California 90067
Telephone: (310) 229-1000
Facsimile: (310) 229-1001

RIEGELS, CAMPOS & KENYON, L.L.P.
CHARITY KENYON
2500 Venture Oaks Way, Suite 220
Sacramento, California 95833
Telephone: (916) 779-7120
Facsimile: (916) 779-7104

THE McCLATCHY COMPANY
STEPHEN J. BURNS
2100 Q Street
Sacramento, California 95816
Telephone: (916) 321-1926
Facsimile: (916) 326-5586

Attorneys for Respondent McClatchy Newspapers, Inc., dba The Sacramento Bee

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

16

QUESTION PRESENTED

Whether a privacy or reputation interest that is not shown to be compelling defeats the strong, constitutional presumption in favor of allowing the press and public access to court files.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	5
A. The Ninth Circuit's Decision Does Not Create A Bright-Line Rule Concerning Privacy Or Reputation. Rather, It Applies Established First Amendment Law To Specific Facts	5
B. The Ninth Circuit's Decision Does Not Create A Conflict With Any Other Court Of Appeals	8
CONCLUSION	12

TABLE OF AUTHORITIES

Page

CASES

Bridges v. California, 314 U.S. 252 (1941) 7

Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) 5, 6

Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) 7

Nixon v. Warner Communications, Inc., 435 U.S. 589 (1972) 6

Oregonian Publishing Co. v. U.S. District Court, 920 F.2d 1462 (9th Cir. 1990) 5

Press Enterprise Co. v. Superior Court of California, 464 U.S. 501 (1984) 6

Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) 6

Times-Mirror Company v. United States, 873 F.2d 1210 (9th Cir. 1989) 6

United States v. Ladd, 218 F.3d 701 (7th Cir. 2000) 11

United States v. Smith, 776 F.2d 1104 (3d Cir. 1985) 1, 8, 9, 10, 11

MISCELLANEOUS

First Amendment 1, 5

Sup. Ct. Rule 10 2

RESPONDENT MCCLATCHY NEWSPAPER, INC.'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Petitioner Unidentified Private Citizen argues that review is warranted in this case because the Ninth Circuit's decision allegedly creates a "bright-line" rule that an interest in reputation can never defeat a First Amendment claim of access to court files, contrary to the law of this Court and of the Third Circuit. Petitioner's argument is meritless. The Ninth Circuit's decision creates no such bright-line rule, and is not in conflict with the law of this Court or the Third Circuit.

The Ninth Circuit did not hold that an interest in reputation can never defeat a First Amendment claim of access to court files. Rather, in keeping with the law of this Court, the Ninth Circuit weighed the privacy and reputation interests asserted by petitioner against the constitutional right of the press and the public to see court files. The Ninth Circuit correctly determined that, on the facts of this case, petitioner failed to show the compelling interest required to overcome the strong presumption in favor of public access.

The Ninth Circuit's opinion does not create a Circuit split. The Third Circuit case on which petitioner relies, *United States v. Smith*, 776 F.2d 1104 (3d Cir. 1985), does not conflict with the opinion here because *Smith* involved highly unusual facts that are nothing like the facts in this case.

In sum, review by this Court is unwarranted because the Ninth Circuit's decision accords with the law of this

Court and does not conflict with any United States Court of Appeals. *See* Sup. Ct. Rule 10.

STATEMENT OF THE CASE

This case arises from a petition for writ of mandamus filed in the Ninth Circuit Court of Appeals by McClatchy Newspapers, Inc., dba *The Sacramento Bee* (*"The Bee"*). *The Bee* sought relief from a district court order denying it access to unredacted versions of two proffer letters attached by a convicted criminal to his motion for a reduced sentence. The underlying facts are undisputed.

In June 1993, Coastal Commission member Mark Nathanson entered pleas of guilty to one count of racketeering based on solicitation of fourteen bribes from persons dealing with the Coastal Commission and one count of filing a false tax return. The bribes, which were between $25,000 and $250,000, were paid by real estate developers and persons owning homes on the coast. The $250,000 bribe was arranged with the help of a state senator later convicted of other federal crimes. On August 24, 1993, Nathanson was sentenced to prison for 4 years and 9 months. Slip opin. at 5781. One year after his sentencing, Nathanson filed a motion to reduce his sentence. He attached to the motion two proffer letters that he claimed contained information of value to the government. Slip opin. at 5782. The first letter claimed that during Nathanson's term on the Coastal Commission, a politician often consulted with him in connection with the politician's efforts to obtain campaign contributions from people who had received favorable action by the Coastal Commission. The second letter expanded on the politician's alleged

wrongdoing and accused another citizen (petitioner) of offering bribes and falsifying tax returns. *Id.*

The district court took no action on Nathanson's motion to reduce his sentence. It placed the motion in the clerk's safe together with the proffer letters, even though they had not been filed under seal. *Id.*

Two years later, the Government moved to reduce Nathanson's prison sentence by a year "in light of assistance he had provided to the government, as well as humanitarian concerns about his skin condition." The district court granted the Government's motion on September 29, 1996. Slip opin. at 5782-83.

In September 1999, Nathanson's probation officer filed a petition to revoke his probation. Slip opin. at 5783. *The Bee*, which was following the Nathanson story, filed a motion seeking access to documents that were not in the court file or referred to in the docket. *The Bee* noted that neither the Government's motion nor the court's order contained any information about the basis for the substantial reduction of Nathanson's sentence. *Id.*

In November 1999, the district court held a hearing on *The Bee's* request and granted the Government's motion to seal the documents in question. In December 1999, the district court released the proffer letters, deleting the names of the politician and the private citizen. The court explained that the redactions were necessary for "the safety of the defendant, his well-being. And also the reputation of other people that the government has concluded there is no evidence to suggest were guilty of crimes but were nevertheless accused of crimes." *Id.* *The Bee* filed a petition for writ of mandamus in the Ninth Circuit to obtain the unredacted letters. *Id.* On January

22, 2001, the Ninth Circuit granted the writ, observing that the Government had acknowledged the unredacted letters posed no safety risk to Nathanson and that the district court had not identified "any facts whatsoever" to support its redactions. *Id.* The Ninth Circuit remanded the case to the district court "to make factual findings in consideration of whether privacy interests alone justify the redactions." *Id.*; *see id.* at 5785.

In April 2001, the district court issued its findings of fact, only one of which pertains to real party's reputation interest. Regarding that interest, the court found that the private individual's reputation was "a significant business asset" and that there was a substantial probability that, absent redaction, the ability of the individual and his company to complete current and anticipated business activities would be harmed. The court also found that: (1) there was no reason to believe the accusations in the proffer letters were true; (2) the court had placed no weight on the proffer letters in reducing Nathanson's sentence; (3) the letters "contain no newsworthy information"; (4) the criminal accusations were prejudicial to the official's reputation; (5) the campaign fund-raising allegations would have "a serious adverse effect upon the official's public and private reputation" and "given the widespread public suspicion of corruption," no amount of denial would "completely dispel suspicion"; and (6) "other innocent parties, including the private individual's partners and employees" would be harmed if the unredacted letters were released. Slip opin. at 5783-84. The district court concluded the redactions served "the compelling interest of protecting both the privacy interests and the reputational interests" of the official, the private individual, and "other innocent persons." Slip opin. at 5784. *The Bee* again sought relief in the Ninth Circuit by petition for

writ of mandamus. The Ninth Circuit granted *The Bee*'s petition and reversed the district court's order, remanding with directions to unseal the letters and make them publicly available without redaction. The Ninth Circuit held that the persons whose names were redacted – petitioner and the unidentified public official – lacked a privacy or reputation interest compelling enough to overcome the strong presumption of public access to court files. *See* slip opin. at 5785.

On July 16, 2002, petitioner filed his certiorari petition.

REASONS FOR DENYING THE PETITION

A. The Ninth Circuit's Decision Does Not Create A Bright-Line Rule Concerning Privacy Or Reputation. Rather, It Applies Established First Amendment Law To Specific Facts.

Petitioner states that "[t]he issue presented here is whether an individual's interest in reputation may *ever* overcome a First Amendment claim of access to court files." (Pet. at 5 (emphasis added).) That was not the issue the Ninth Circuit decided. The Ninth Circuit did not hold that an interest in reputation may *never* overcome such a claim; rather, it held that the private citizen's interest did not overcome *The Bee*'s claim in this case. Slip opin. at 5786-87.

It is well-established that the press and the public have a presumptive right of access to court proceedings and documents under the First Amendment. *E.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982); *Oregonian Publishing Co. v. U.S. District Court*, 920 F.2d 1462 (9th Cir. 1990). This strong presumption in

favor of access may be overcome only by showing a compelling interest that no alternative will adequately protect. *Globe Newspaper*, 457 U.S. at 607; *Press Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 510-11 (1984). As petitioner acknowledges, the decision is made on a case-by-case basis. *Globe Newspaper*, 457 U.S. at 607; *Press Enterprise*, 464 U.S. at 511 n.10. (See pet. at 7-8.)

As the Ninth Circuit recognized here, "Courts have properly refused 'to permit their files to serve as reservoirs of libelous statements for press consumption' or 'as sources of business information that might harm a litigant's competitive standing.'" Slip opin. at 5785 (quoting *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1972). The Ninth Circuit went on to cite several of this Court's cases and one of its own for specific examples of the limited circumstances in which individual privacy rights may "rise to the level of a substantial governmental interest and defeat First Amendment right of access claims." *Id.* (citing *Globe Newspaper*, 457 U.S. at 607 (interest in protecting minor victims of sex crimes from further trauma and embarrassment); *Press Enterprise*, 464 U.S. at 511 (governmental interest in protecting the privacy of jurors); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35-36 (1984) (governmental interest in preventing abuse of the civil discovery process); *Times-Mirror Company v. United States*, 873 F.2d 1210, 1215-16 (9th Cir. 1989) (governmental interest in not tipping off suspected criminals by disclosure of search warrants)).

But, the Ninth Circuit concluded, "No such interest has been established here." Slip opin. at 5786.

Petitioner asserts that the Court "did not weigh the District Court's factual findings as to the substantial

probability that the Private Citizen will suffer reputational damage if the proffer letters are released in unredacted form" (pet. at 12) and that it "fail[ed] even to consider the District Court's factual findings as to reputational injury" (pet. at 13). These assertions are belied by Ninth Circuit's opinion, in which the Court explicitly acknowledged and addressed the district court's findings of fact concerning injury to reputation generally, and injury to the private citizen's reputation:

> Who could or would deny that reputation is a valuable asset? Who would dispute the district court's observation that a charge of corruption against a public official is difficult to dispel by denial? But injury to official reputation is an insufficient reason for "repressing speech that would otherwise be free." [Citation.] Silence enforced upon the press to protect the reputation of judges is more likely to "engender resentment, suspicion and contempt much more than it would enhance respect." [Citation.] The same is true of public officials *and of real estate developers engaged in projects requiring government approval.*

Slip opin. at 5786-87 (emphasis added) (citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841-42 (1978) and *Bridges v. California*, 314 U.S. 252, 271 (1941)).

The Ninth Circuit concluded that the district court's findings did not overcome the legitimate "right of the press to explore and to publish" the relevance of the proffer letters to Nathanson's reduction in sentence. *Id.* at 5787. "No adequate justification for . . . redaction has been offered by the court or by the official *and the individual* affected. . . ." *Id.* (emphasis added).

In sum, the Ninth Circuit considered the district court's findings and the private citizen's arguments concerning his interest in reputation, and determined they were not compelling enough to overcome the press's right of access to the unredacted letters in this case. The Ninth Circuit's decision thus fully accords with the law of this Court. Petitioner's dissatisfaction with the result in this case does not warrant review by this Court.

B. The Ninth Circuit's Decision Does Not Create A Conflict With Any Other Court Of Appeals.

Petitioner also argues that the Ninth Circuit's decision creates a circuit split because it allegedly conflicts with the Third Circuit's decision in *United States v. Smith*, 776 F.2d 1104 (3d Cir. 1985). Petitioner is wrong. There is no circuit split because *Smith* involved highly unusual facts that are nothing like the facts in this case.

In *Smith*, the Third Circuit recognized that the First Amendment right of access to court records can only be overcome where the interests of the party seeking secrecy "rise to the level of a compelling governmental interest." *Id.* at 1112. The *Smith* court held that persons listed as unindicted co-conspirators in a United States Attorney's bill of particulars had demonstrated such privacy and reputational interests where the United States Attorney "overstepped the bounds of the permissible use of the bill of particulars." *Id.* at 1117 (Mansmann, J., concurring); *see id.* at 1115 (emphasizing that "potential damage to reputation and career . . . [alone] does not constitute a 'compelling governmental interest' justifying limitation of First Amendment public access rights").

As the *Smith* court explained, the bill of particulars named not just persons the United States Attorney believed to be unindicted co-conspirators but also persons "who, in his opinion, '*could conceivably be considered* as unindicted co-conspirators due to their alleged involvement in events included in the conspiracy.'" *Id.* at 1113 (emphasis in original). The United States Attorney exacerbated this error by listing all of these persons as "unindicted co-conspirators" without indicating that some could only "conceivably be considered" co-conspirators. *Id.* at 1117 n.3 (Mansmann, J., concurring). The United States Attorney did this not because he believed in (or possessed the requisite evidence of) their guilt, but to make it easier for him to prove his case against those who were indicted. *Id.* (the Government asserted "it had [created such a broad list] for the tactical purpose of not limiting the evidence it could produce at trial"). Compounding these Government improprieties, the United States Attorney compiled his list at the outset of his investigation, before he was able to form an opinion whether to prosecute any of these unindicted individuals, and failed to state any "facts providing a context for evaluating the basis for [his] opinion with respect to any given individual." *Id.* at 1113.

Under these circumstances, the *Smith* court concluded "it [was] virtually certain that serious injury [would] be inflicted upon innocent individuals" should their names be made public on a document that falsely declared the Government believed they were co-conspirators. *Id.* at 1114. Accordingly, the Third Circuit affirmed the trial court's order "denying access to the sealed portion of the bill of particulars." *Id.* at 1115.

In sum, *Smith* was a highly unusual case because of its peculiar facts. The Government charged people with

crimes without completing its investigation, without setting forth the basis for its conclusions, and without revealing that some of them could only "conceivably be considered" co-conspirators, all solely "for the tactical purpose of not limiting the evidence it could produce at trial." *Id.* at 1116-17 (Mansmann, J., concurring). These facts have nothing to do with this case, which does not involve Government accusations at all.

The instant case does not involve any accusations by the Government that petitioner is guilty of anything. To the contrary, the documents at issue here were penned by a criminal whose veracity was never accepted by the Government or the court below. Slip opin. at 5786, 5782. Thus, the fundamental premise of *Smith* – that Government accusations will convey to the public the message that an individual has committed a crime – does not exist here.

Further, the accusations here do not suffer from a factual vacuum. Unlike a bill of particulars, Nathanson's letters are not unadorned statements by the Government accusing an individual of criminal involvement. Rather, the letters detail the particulars of petitioner's alleged wrongdoing, as perceived by a criminal known for his mendacity and motivated by his own self-interest, i.e., to reduce his sentence. Thus, the public has a factual basis for assessing them. Finally, this case does not involve Government accusations that are made without an investigation, that are misleading because they say someone is a co-conspirator even though he or she might only "conceivably" be one, and that are made just to facilitate

the Government's case against the indicted co-conspirators.[1]

In sum, the concerns prompting the court to seal information in *Smith* – i.e., interference with a government investigation or the danger of "tarnishing the reputation of individuals ... named by the Government," *Ladd*, 218 F.3d at 706, are completely absent here. The Ninth Circuit's opinion thus creates no Circuit split warranting review in this case.

---

[1] A recent Seventh Circuit case involving publication of a bill of particulars cast doubts on *Smith*'s validity by stating it was declining to "decide definitively the correctness of the holding in *Smith*." *United States v. Ladd*, 218 F.3d 701, 704 (7th Cir. 2000). The *Ladd* court declined to follow *Smith*, distinguishing it as a case of government overreaching. *See id.* at 704, 706 (the *Smith* court's "animating concern ... to avoid tarnishing the reputations of individuals who had been named co[-]conspirators by the Government without any judicial check on the factual basis for the imposition of such a label"). *Ladd* thus reinforces the conclusion that *Smith* is an exceptional case, limited to its facts (if it is valid at all), and should not be expanded to limit the First Amendment right of access to public records where the accusations of criminal conduct are not made by the Government.

CONCLUSION

For the foregoing reasons, *The Bee* respectfully requests that this Court deny the Petition.

Respectfully submitted,

AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P.
REX S. HEINKE
Counsel of Record
L. RACHEL HELYAR

RIEGELS, CAMPOS & KENYON, L.L.P.
CHARITY KENYON

THE MCCLATCHY COMPANY
STEPHEN J. BURNS

Attorneys for Respondent McClatchy Newspapers, Inc. dba The Sacramento Bee